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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

MARCELA FLORIANO,

Defendant and Appellant.

F069235

(Super. Ct. No. BF151525A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Gary T. Friedman, Judge.

Joy A. Maulitz, under appointment by the Court of Appeal, for Defendant Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Amanda D. Cary, and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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*Before Gomes, Acting P.J., Peña, J., and Smith, J.

Marcela Floriano appeals from her conviction for first-degree burglary. She argues the prosecutor committed prejudicial misconduct by failing to instruct witnesses and potential witnesses not to discuss matters pertaining to the trial among themselves during the pendency of the trial as she was required to do under an in limine ruling of the trial court. Floriano contends the prosecutor, in an affirmative violation of the in limine ruling, also instructed a witness to discuss an issue in the case with a potential witness. Finally, Floriano contends the trial court committed reversible error in rejecting a defense request for an instruction on trespass or unauthorized entry as a lesser-included offense of burglary. We reject these contentions and affirm the judgment.

FACTS AND PROCEDURAL HISTORY

Floriano was charged in a one-count information with residential burglary. (Pen. Code,¹ § 460, subd. (a).) The information included a special allegation that the charged offense was a violent felony within the meaning of section 667.5, subdivision (c)(21), because another person, other than an accomplice, was present in the residence at the time the burglary was committed. A jury convicted Floriano of burglary. The jury also found the special allegation to be true.

The court sentenced Floriano to the middle term of two years on the burglary and to an additional two years on the special allegation, for an aggregate term of four years in prison.

Prosecution case-in-chief

Jeremy Martin lived at 2205 Akers Road with his girlfriend, Miranda Lomeli-O'Reilly, and their landlady, Erin Thompson. His garage had been broken into on September 15, 2013, and some items were taken.

At about 9:45 a.m. on September 16, 2013, Martin was home alone, asleep, when he was awakened by a loud banging against his bedroom window. Martin looked out the

¹Subsequent statutory references are to the Penal Code unless otherwise specified.

window and saw a woman he had never seen before; the woman was later identified as Floriano. “[I]t appeared that she was attempting to either break the glass or somehow force the window to slide open.” Martin thought that Floriano could not see into the house because of light reflecting on the glass.

Floriano moved away from the window. Martin went to the living room, retrieved his cell phone, and called 911. He heard additional banging sounds that continued for quite some time. The sounds were intermittent, not at all indicative of a person knocking or seeking to make their presence known.

He then heard a noise in the laundry room and saw someone reaching through the pet door, apparently trying to grasp the doorknob. Although Martin did not notice it at the time, a video he recorded on the spot showed what looked like a screwdriver in the person’s hand.

Martin had moved to the entryway of the house, between the front door and the living room, when he heard “a commotion” at the kitchen window. Based on the sounds he heard, he realized that “someone had entered the home and had crawled over the sink and ... reached the floor.” From her point of entry in the kitchen, Floriano would not have been able to see Martin in the entryway. Similarly, Martin also did not see Floriano actually coming through the kitchen window. Earlier, given the uncertainty of the situation, Martin had grabbed a kitchen knife “to function as a deterrent.” He did not know “if there was more than one individual” and his “mind-set was that [he] probably would need to protect [himself]”

Five to ten seconds after Floriano gained entry, Martin saw Floriano in the dining room of the house. To enter the dining room from the kitchen, Floriano walked past a desk with a laptop, speakers, and possibly a printer on it, but she did not try to pick up or move anything. Floriano saw Martin, who was still in the entryway by the front door, as she turned into the dining room. She was startled and gasped, indicating “she was

surprised that someone was in the home.” She did not say “[C]an you help me?” or “I’m just trying to get out of here.”

Martin, who was holding the kitchen knife with the tip pointed up, confronted Floriano.² He told her to stay where she was and to sit down. Floriano continued into the living room as Martin entered it from the other end. She ran to the opposite side of the coffee table from Martin and out the front door. Martin unsuccessfully tried to grab her shirt as she exited the house.

Martin chased after Floriano, jettisoning the knife in the front yard. At some point, Martin told Floriano the police were coming. Floriano told him she had kids; Martin did not recall if she asked him to leave her alone. Martin chased Floriano down several streets. She jumped over a fence that was five or six feet tall, apparently without any trouble, with Martin following. Eventually Floriano took out a car key, circled back to a White Volkswagen Passat, got in the car and drove away. Martin gave the car’s license plate number to the 911 dispatcher as it pulled away.

When Martin returned to his house, he discovered the kitchen window screen had been removed and was lying on the ground in the backyard. Several small ceramic planters that usually stood on the inside window sill had been placed outside as well. Martin did not know of anything that had been stolen from the house.

The house next to Martin’s was 2201 Akers. The occupants of 2201 Akers had two pit bulls and possibly some puppies. The dogs would either be kept loose in the backyard or, at times, were constrained in a dog run in the side yard, alongside the fence separating 2201 Akers from Martin’s house. At some point after the incident involving Floriano, the residents of 2201 Akers moved away with their dogs. Martin was not aware

²During his rebuttal testimony, Martin indicated that his arm was slightly bent at roughly a 90-degree angle.

whether a certain planter kept in the backyard was located adjacent to the fence on September 16, 2013.³ The fence itself was approximately six feet high.

About a month after the incident, Martin was a passenger in a car driven by his girlfriend when he saw the white Passat in the neighborhood, at the corner of Akers and Ardmore. He recognized the first two characters of the car's license plate as matching those of the car Floriano had driven away in. He saw Floriano's face as she sat in the car. Martin and his girlfriend followed the Passat into a parking lot; they saw Floriano park her car, get out, and go into a Michael's craft store. Martin called 911.

Detective Kenneth Sporer of the Bakersfield Police Department was one of the officers who responded to Michael's parking lot. He talked to Martin about the incident that occurred at Martin's house on September 16, 2013. Martin said he had seen a tattoo on the back of the intruder's neck. When Floriano came out of the store, Martin identified her as the woman who was in his house.

Defense case

A defense investigator, Samantha Bone, testified that she took photographs of the property at 2201 Akers, next door to Martin's house, on February 5 and 18, 2014. The home was empty and apparently in foreclosure at the time; an eviction notice dated December 5, 2013, was posted on the door. There was no fence or other obstacle blocking entry into the backyard and Bone was able to walk directly onto the property. If any dogs had been present in the backyard, there would be nothing preventing them from leaving. Bone did not know what the property looked like on September 16, 2013.

Floriano testified on her own behalf. She was five feet five inches tall and 32 years old at the time of trial. She had a forgery conviction from 2009 but had no law enforcement contacts between 2009 and 2013. She had used methamphetamine starting

³The planter was later identified as a compost bin; at the time of trial it was located right next to the fence.

at the age of 12 or 13 up to 2009, with a relapse in August 2010. She got married in April 2013 and, although she was not employed at the time of the offense, her husband worked and supported her.

On September 16, 2013, after dropping her kids off at school, she went to a convenience store in the neighborhood. There she ran into Maribel Gamboa, someone she used to get high with. Gamboa offered her “some drugs” and Floriano accepted them; Gamboa also gave Floriano her phone number so Floriano could obtain more drugs from her when needed. Floriano used the drugs when she got home; she lived in a condo complex at 4108 Ardmore, at the corner of Akers.

Shortly thereafter, Floriano “saw who [she] thought was [her] husband pulling up, so [she] ran out [her] back door.”⁴ She did not want her husband to “catch [her] high” as he had never seen her on drugs before. Eventually she went into the backyard of 2201 Akers, a corner house next to Martin’s. There was no barrier to prevent her from entering the backyard. She did not see or hear any dogs in the backyard of 2201 Akers.

At the time, Floriano thought her husband was chasing her, but she did not see him behind her at any point. She “jumped” the fence into Martin’s backyard without difficulty. She stepped on something to help her over but could not remember what it was. Once in Martin’s yard, she attempted to keep going by trying to open the back gate but it was locked. A gate that led to the front area of the house was also locked. Although her husband would not have been able to see her in the backyard of 2205 Akers, she “began to panic, so [she] banged on Mr. Martin’s window.” She wanted to get out of the yard and back on the street in front. She banged on the window in an attempt to make contact with the homeowner; she also tried to push open a window but it would not open. At no point did she shout for help or say, “let me in, I’m trying to get out.”

⁴On cross-examination, Floriano testified the family had only one car at the time, a Volkswagen Passat, and it was parked directly in front of the apartment complex she lived in.

She tried to move a planter to climb over the fence, but it was too heavy. There was a little ladder-like plant stand in the backyard, with a number of potted plants on it. Floriano attempted to move it over to the fence, but “some of their planters fell, so [she] stopped and ... put their planters back on there.” She did not recall seeing a trash or recycling bin in the backyard.

Floriano returned to the house and knocked on a sliding door; she then went to the kitchen door. She put her hand through the “doggie door” and attempted to grasp the doorknob, but could not reach it. So she grabbed a “tool” from the tiered plant stand and “went back to the doggie door” to try to reach the doorknob with the help of the tool. Again, she was unsuccessful. She then removed the screen from the kitchen window, opened the window, and “went in their house.” She very possibly moved items off the window sill because she was trying not to damage any property. After opening the window, she did not shout for help or otherwise try to ascertain whether anyone was available to help her.

Floriano went into the house to find a way to get off the property and go back home. She did not intend to remove anything from Martin’s house. She was familiar with the houses on Akers Street as she drove by them everyday when taking her kids to school. She knew where the front door would be and, upon entering the house, immediately began walking in that direction. She did not attempt to pick up or move any items in the house.

Only a couple of seconds after she entered the house, Floriano saw Martin; he was holding a knife to her face. He told her to “stop right there.” She got startled because she thought nobody was there. She did not know whether he would hurt her so she told him she had kids. She was able to run around him and out the front door. He then chased her as she ran down Akers; she assumed he had the knife with him. She ran down Akers to Ardmore, past her own house. She did not stop at her house because “[Martin] was still

chasing [her] at that point.” As she ran, she passed other people; she did not ask them to help her or to call the police.

At some point, Floriano’s leg began to hurt so she stopped. Martin accused her of breaking into his garage the previous week. Floriano denied doing that and told him she was just trying to get off the property. Martin also told her the police were coming and she would go to jail. When he told her that, Floriano ran to her car, which was parked directly in front of her house, and drove off. Floriano later told her husband and the person in charge of her recovery classes what had happened, but did not contact the police or Martin.

On October 23, 2013, she was contacted by officers in Michael’s parking lot. Initially the officers told her that her car was seen leaving the scene of an attempted robbery about a month earlier. Floriano was not sure what they were referring to so she mentioned that the investigation might concern her sister, who had visited her about a week after the incident at Martin’s house. Later, when Detective Sporer talked to her, she realized that he was referring to the incident at Martin’s house. She also mentioned her sister’s visit to the detective; he asked whether her sister had any tattoos. Floriano testified that it was possible she told Sporer that because her sister always wore her hair down, however, Floriano could not definitively say whether her sister had tattoos or not.

Detective Sporer told Floriano that someone had identified her as a person who had broken into a house. “At that point [Floriano] told him it sounded like [she] needed a lawyer.” Floriano testified it was possible she also told the detective that she had definitely never broken into this or any other house. Floriano did not tell Sporer she had been in Martin’s house because she did not want to go to jail.

Rebuttal case

Martin’s roommate, Erin Thompson, owned the house at 2205 Akers. She was not present during the incident on September 16, 2013. The neighbors at 2201 Akers had two dogs and some puppies; at the time the incident occurred, the dogs were continually

kept in the backyard of the house. There was an old car, as well as a shed and a little metal fence or gate blocking the driveway of 2201 Akers at that time.

Thompson had not had a dog since March 2012. Therefore, the pet door within the kitchen door was always secured by a plate; the plate was typically locked (one could slide the plate down on rails and lock it into place). After the incident on September 16, 2013, part of the plate mechanism was bent, the plate itself was on the floor, and a strip connected to it was broken off and found in the backyard.⁵

Thompson testified that she and Miranda Lomeli-O'Reilly both liked to garden. Thompson had moved a wooden composting bin next to the fence at the end of July 2012; the composting bin had remained there since. Prior to July 2012, the composting bin was situated about three feet away from the fence. Thompson was able to move the bin, although it was "pretty heavy." The day before Thompson testified, Martin asked her when she had moved the compost bin next to the fence. Thompson had talked to Martin about three times about the case.

Miranda Lomeli-O'Reilly was Martin's girlfriend and also lived at 2205 Akers. She discussed the case with Martin. Martin mentioned the types of questions he was asked. Lomeli-O'Reilly said the neighbors had very loud pit bulls. Although the dogs were in the open backyard "a good percentage of the time," Lomeli-O'Reilly could not say whether they were in the open backyard or in the closed dog run area in the side yard on September 16, 2013.

Martin testified he discussed the case with his roommates during the trial, including the questions he was asked and his responses. He testified that he spoke to Thompson about the layout of the backyard at the request of the prosecutor.

⁵Martin testified, in the rebuttal phase, that the video he shot of Floriano reaching through the pet door actually depicted the plate lying "in the middle of the floor."

Detective Sporer testified that, when he talked to Floriano in Michael's parking lot on October 23, 2013, she denied any involvement in the incident under investigation. He specifically asked her if she broke into the house at 2205 Akers and she said no.

DISCUSSION

I. Prosecutorial misconduct and defense motion for mistrial

Floriano argues the prosecutor committed prejudicial misconduct by violating an in limine ruling requiring her to advise witnesses not to discuss matters pertaining to the case during the pendency of the trial. Floriano contends the prosecutor not only failed to advise witnesses not to discuss the case, but affirmatively violated the court's order during the rebuttal phase by instructing Martin to ask Thompson where a backyard compost bin was located on the day of the incident. Martin discussed the placement of the compost bin with Thompson before the latter testified at trial; Thompson then testified that the bin was located next to the fence, contradicting Floriano's testimony that it was not alongside the fence when she was in the backyard.

Defense counsel made a motion for mistrial based on the fact that Martin, as a result of the prosecutor's actions, went ahead and discussed Thompson's potential testimony with her; in addition, he discussed his own testimony regarding the setup of the backyard area of 2201 Akers, as well as the presence of dogs there, with both Thompson and Lomeli-O'Reilly, shortly before the latter two testified in the rebuttal phase. Counsel argued it was impossible to know whether these discussions influenced the respective testimony of Thompson and Lomeli-O'Reilly with regard to the placement of the compost bin, the condition of the backyard area at 2201 Akers, and/or the presence of dogs in backyard of 2201 Akers. The court denied the motion for mistrial. Floriano argues the court committed reversible error.

We reject both Floriano's claim of prejudicial prosecutorial misconduct, as well as her contention that the trial court's denial of her mistrial motion constitutes reversible error.

A. Background

Prior to trial, the court granted a defense motion in limine requiring the court to “[o]rder all witnesses to not talk or otherwise communicate with each other or others, excepting the Deputy District Attorney and Defense Counsel, during the pendency of the trial regarding matters pertaining to their testimony, including questions asked and answers given.” The trial court granted a similar motion in limine brought by the prosecution. In addition, the court granted a motion to require “the Deputy District Attorney to advise its witnesses, particularly law enforcement witnesses, of the court’s rulings regarding the in Limine Motions.” Floriano argues the prosecutor’s conduct violated these rulings.

In an Evidence Code section 402 hearing that was held outside the presence of the jury, Martin testified he did not recall being instructed not to discuss his testimony with other witnesses or potential witnesses. He said that he discussed the location of the compost bin with Thompson at the direction of the prosecutor. He also said he discussed his testimony regarding the placement of structures in the driveway of 2201 Akers, as well as the presence of the dogs, with both Thompson and Lomeli-O’Reilly. Finally, he stated that the three of them discussed the importance of being truthful and that it had been each one’s policy to only adopt positions that he or she individually believed in; but he could not say for certain whether any information he provided influenced the respective testimony of either Thompson or Lomeli-O’Reilly.

Directly after the Evidence Code section 402 hearing, defense counsel moved for a mistrial, arguing that Martin’s disclosures could have influenced Thompson’s and Lomeli-O’Reilly’s testimony. Counsel was not concerned about any influence on Martin’s testimony, as he had already testified in the prosecution’s case-in-chief. She was specifically concerned about Thompson’s and Lomeli-O’Reilly’s testimony based on Martin’s disclosures to them about his own testimony, concerning, in particular, their backyard, the appearance of the driveway and backyard at 2201 Akers, and the presence

of dogs at 2201 Akers. Counsel argued as follows: “[Martin] said he wasn’t admonished. He went so far as to go and ask questions of a potential witness at the direction of the district attorney when she knew that there was a court order that they shouldn’t discuss their testimony. He not only discussed his testimony, but he’s asking her about specifics of [her] testimony. And based on that, I am asking the Court to declare a mistrial.”

The prosecutor argued she was entitled to call Thompson and Lomeli-O’Reilly to rebut Floriano’s statements that the compost bin was not located near the fence and that there were no dogs in the neighboring yard. She further stated that defense counsel was free to cross-examine Thompson and Lomeli-O’Reilly about any discussions that were had.

The trial court acknowledged there might be a “technical violation of the Court’s order by the prosecutor.” However, the court denied the motion for mistrial because it did not find “any nexus between any communication between Mr. Martin and Miss [Lomeli-O’Reilly] or Miss Thompson that in any way jeopardizes or compromises Miss Floriano’s right to a fair trial”

B. Analysis

1. Prosecutorial misconduct claim

Floriano argues the prosecutor’s failure to admonish Martin not to discuss his testimony with other potential witnesses while the trial was pending, and her instruction to Martin to ask Thompson when she moved the compost bin next to the fence, violated the court’s in limine rulings and, in turn, constitutes misconduct.⁶ She contends that, as a

⁶Floriano further argues that the prosecutor’s misconduct was compounded by “the prosecutor’s belated compliance with discovery.” Specifically, she alleges that “[d]efense counsel did not learn until the middle of trial that the prosecutor intended to introduce evidence that there were dogs present on the property at 2201 Akers, or that there was a compost box in a location such that it could have been used for climbing over the fence at 2205 Akers.” Floriano is evidently referring to the rebuttal testimony of

result of the prosecutor's actions, Martin discussed his testimony regarding the appearance of the backyard area of 2201 Akers and the presence of dogs on that property with Thompson and Lomeli-O'Reilly; he also discussed the location of the compost bin with Thompson. Floriano argues Martin's disclosures were prejudicial because they influenced Thompson's and Lomeli-O'Reilly's rebuttal testimony to Floriano's detriment. Specifically, she asserts that the "testimony of these rebuttal witnesses was extremely damaging to [Floriano's] credibility, as it strongly suggested (1) that [Floriano] could not have gotten into the neighbor's back yard as easily as she said; and (2) that she could have gotten out of the back yard of 2205 Akers more easily than she said. These inferences were critical because it was [Floriano's] defense that she was trying to hide from her husband, and only entered the house at 2205 Akers because she could not get out of the back yard." We reject Floriano's claim of prejudicial prosecutorial misconduct.

The standards governing review of misconduct claims are well settled. "A prosecutor's conduct violates the federal Constitution when it "infects the trial with such unfairness as to make the conviction a denial of due process." [Citations.]" (*People v. Hinton* (2006) 37 Cal.4th 839, 862.) "Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under [California] law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." [Citation.]" (*Id.* at p. 863.) "Prosecutorial misconduct, however, will not be grounds for reversal unless it is shown to be prejudicial." (*People v.*

Lomeli-O'Reilly and Thompson. (Martin only testified about the dogs in the prosecution's case-in-chief and did not know where the compost box was located on the day of the incident.) Floriano's contention has no merit because the prosecutor specifically stated that (1) she called Lomeli-O'Reilly as a witness without talking to her ahead of time and thus had no statement to provide in discovery, and (2) she decided to call Thompson as a witness at the last minute and provided discovery to counsel as soon as she obtained any discoverable information.

Villa (1980) 109 Cal.App.3d 360, 366.) “[T]he judgment will not be reversed [on state law grounds] unless, after a review of the entire cause, it appears it is “reasonably probable” that a result more favorable to defendant would have occurred had the district attorney refrained from the misconduct in question” (*People v. Bryden* (1998) 63 Cal.App.4th 159, 182.) “However, if federal constitutional error is involved, then the burden shifts to the state ‘to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’ [Citation.]” (*People v. Bolton* (1979) 23 Cal.3d 208, 214.)

Here, even if we assumed the prosecutor’s actions constituted misconduct, Floriano cannot demonstrate the misconduct was prejudicial under the applicable *Watson* standard of prejudice. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Floriano testified that the compost bin was not located next to the fence on the date in question. She also testified that she was easily able to access the backyard of 2201 Akers, the house next to Martin’s, and did not see or hear any dogs at that property.

The prosecutor called Thompson, Lomeli-O’Reilly, and Martin as rebuttal witnesses.⁷ Thompson testified that she placed the compost bin against the fence in July 2012 because there was a gopher underneath it in its prior location, which was about three feet out from the fence. She testified that the bin, although heavy, was movable; in fact, she had moved it to its present location. Thompson testified that the day before her testimony, Martin had asked her if she remembered when she had moved the compost bin next to the fence. She also testified that she had discussed the case on about three occasions with Martin.

Regarding the appearance of 2201 Akers, the neighboring property, Thompson testified that an inoperable vehicle that was in the driveway at the time of the offense had subsequently been moved to the street. Thompson also testified that, during the time

⁷Detective Sporer was also a rebuttal witness for the prosecution.

period in question, the dogs next door had continuously been in the backyard rather than the dog run in the side yard. They had remained in the backyard ever since the female pit bull had delivered a litter of puppies. Thompson, however, did not testify that she knew to any certainty that the dogs were actually in the backyard on September 16, 2013.

Lomeli-O'Reilly testified that she had recently discussed the case with Martin and Thompson; she said Martin had not discussed his testimony but only the types of questions he was asked. Lomeli-O'Reilly testified that the dogs next door would generally either be in the side yard or the backyard; "a good percentage of the time they were in the open backyard." She could not say which area they were in on September 16, 2013. Lomeli-O'Reilly did not testify about the location of the compost bin in her backyard or about the appearance of the driveway and backyard areas of 2201 Akers.

Martin testified that he had recently spoken to both Thompson and Lomeli-O'Reilly about his testimony in the case. He also talked to Thompson about the layout of their backyard at the request of the prosecutor and asked Thompson where the compost bin was located on September 16, 2013. (Thompson told him it was moved to its present position next to the fence, prior to that date.) As for his part, Martin testified that he did not know where the compost bin was located on that day and had likely informed Thompson accordingly.

Martin did not testify, in the rebuttal phase, about the setup of the driveway and backyard at 2201 Akers on September 16, 2013. However, he had earlier testified that there were various items strewn about throughout the driveway and backyard of 2201 Akers, there was an inoperable vehicle in the driveway, and there was no clear path leading through the rubble in the driveway. Similarly, Martin did not address the dogs in his rebuttal testimony but had previously testified that the dogs ordinarily were either in the backyard or the side yard of the neighboring property. Martin had said he was "unaware of the presence of the dogs" on the day of the incident, in that he could not say either that he had or had not seen them. Martin had further testified that, "It's my

recollection that there were times I didn't hear the dogs, and that led me to believe that the dogs at least weren't present in the side yard or in the backyard.”

Here, Martin, Thompson, and Lomeli-O'Reilly candidly admitted they had discussed various aspects of the case among themselves shortly before testifying in the rebuttal phase. The jury was aware of this fact and was free to consider it in evaluating their respective testimony. All three witnesses were also subject to cross-examination on the impact of their discussions on the testimony that each provided in the rebuttal case. Defense counsel chose not to cross-examine Thompson or Lomeli-O'Reilly on this point, and there is no evidence that Martin's disclosures influenced either Thompson's or Lomeli-O'Reilly's testimony on the relevant issues.

Furthermore, none of these witnesses—Martin, Thompson, or Lomeli-O'Reilly—identified the actual location of the dogs on September 16, 2013. Rather, they addressed the location of the dogs, as a general matter, during the relevant time period. Thus, the impact of any discussions among them on this point would appear to be minimal.

The impact of any discussions among Martin, Thompson, and Lomeli-O'Reilly concerning the setup of the backyard area of 2201 Akers would also appear to be minimal, as Thompson did not testify about this issue in any detail and Lomeli-O'Reilly did not testify about it at all.

Finally, the evidence against Floriano was overwhelming, based on the testimony of Martin and Detective Sporer alone. Martin even had a video showing Floriano reaching through the doggie door in the kitchen, attempting to grasp the doorknob with some sort of tool; the video also showed that the locked plate that normally covered the doggie-door opening had been forced off its tracks, and was lying on the floor. When Martin confronted Floriano she ran away, and, when police subsequently questioned her, she denied she had been in the house and tried to blame the incident on her sister.

Floriano's theory of defense, i.e., that she tried to force open windows, tampered with the doggie door, and eventually entered someone else's home, only so she could

simply walk straight out to the street in front, was exceptionally weak. Indeed, Floriano's references to a small tiered or ladder-like plantstand in the backyard, which she could potentially have used to climb back over the fence, completely undercuts her testimony that there was no other way for her to get out of the backyard except through the house. Her stated explanation that she did not move the plantstand because a few planters fell off it when she tried to do so is unpersuasive in light of the lengths she admittedly went to in order to gain access to the house itself. Furthermore, the fact that Floriano was able to get over the fence in order to enter Martin's backyard begged the question why she would be unable to do the same to get out, especially as she was able to jump a similar fence with no apparent difficulty, when Martin was chasing her after she fled out his front door. Belying Floriano's claim that "[t]he case was a close one," the jury reached a verdict after deliberating for a mere 1.5 hours.

In sum, Floriano has not demonstrated that she was prejudiced by the prosecutor's actions. It is not reasonably probable the jury would have reached a different result even if Thompson had not testified that the compost bin was located next to the fence and Thompson and Lomeli-O'Reilly had not testified that their neighbor's dogs were usually in the backyard during the relevant time period. (*People v. Watson, supra*, 46 Cal.2d at p. 836.) Accordingly, we reject Floriano's claim of prosecutorial misconduct.

2. *Motion-for-mistrial claim*

Floriano argues the trial court's denial of her motion for mistrial constitutes reversible error because it is impossible to know whether Martin's discussions with Thompson and Lomeli-O'Reilly influenced their respective testimony regarding the location of the compost bin, the appearance of the backyard area of 2201 Akers, and/or the presence of the dogs next door.

A motion for mistrial should be granted when "a [defendant's] chances of receiving a fair trial have been irreparably damaged." (*People v. Harris* (2013) 57 Cal.4th 804, 848.) "Whether a particular incident is incurably prejudicial is by its

nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions”””” (*Ibid.*) On appeal we review the denial of a motion for mistrial under the deferential abuse of discretion standard. (See *People v. McLain* (1988) 46 Cal.3d 97, 113.) We reject Floriano’s contention that the court’s denial of the motion was reversible error.

In light of the record discussed above, we cannot say the trial court abused its discretion in denying the motion for mistrial, particularly since any error relating to admission of the challenged testimony was harmless in light of the overwhelming evidence of Floriano’s guilt. (See *People v. Harris* (1994) 22 Cal.App.4th 1575, 1581.) It is not reasonably probable the jury would have reached a different result had Thompson not testified about the location of the compost bin and neither she nor Lomeli-O’Reilly testified about the dogs next door. (*Ibid.*; *People v. Watson, supra*, 46 Cal.2d at p. 836.)

II. Defense request for trespass instruction

Floriano next contends the trial court committed prejudicial error in denying her request for an instruction on trespass as a lesser-included offense of burglary. We reject this contention.

“Under California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser. [Citations.]” (*People v. Birks* (1998) 19 Cal.4th 108, 117-118 (*Birks*).)

Residential burglary is the entry of a dwelling or house with the intent to commit a felony. (§§ 459, 460, subd. (a).) Criminal trespass, also known as “unauthorized entry,” is the entry of a residence without the owner’s consent. (See § 602.5, subds. (a) & (b).)

A lack of consent to the entry thus is an element of trespass but not of burglary. (*People v. Sherow* (2011) 196 Cal.App.4th 1296 [lack of consent is not element of

burglary]; accord *People v. Sigur* (2015) 238 Cal.App.4th 656 [lack of consent is not element of burglary].) Accordingly, it is settled that trespass is not a lesser-included offense of burglary under the elements test because burglary may be committed by a person who has permission to enter a dwelling, so long as the person had, at the time of entry, an intent to commit a felony. (*People v. Lohbauer* (1981) 29 Cal.3d 364, 369).

Nonetheless, Floriano contends the accusatory pleading test is satisfied. Under the accusatory pleading test, we consider whether the “accusatory pleading describes the greater offense in language such that the offender, if guilty, must necessarily have also committed the lesser crime. [Citation.]” (*People v. Moon* (2005) 37 Cal.4th 1, 25-26.). Floriano points to the language of the information, which alleges she “unlawfully” entered Martin’s home. She asserts the nonconsensual entry required for trespass is necessarily included in the allegation that Floriano made an unlawful entry.

In a burglary, however, the entry is unlawful because it is committed with the intent to commit a felony. Therefore, the information alleged Floriano “unlawfully” entered Martin’s home “with the intent to commit larceny or any felony” It did not allege that Floriano “unlawfully” entered the home “without the owner’s consent.” Under the facts alleged in the information, it was Floriano’s intent to steal that made her entry unlawful, not the owner’s lack of consent. Accordingly, the information did not allege a trespass under the accusatory pleading test, and the trial court was not required to instruct on trespass as a lesser-included offense of burglary.⁸

Our Supreme Court came to the same conclusion in *Birks*, where the burglary allegations (that the defendant “‘did willfully and unlawfully enter a commercial building ... with intent to commit larceny and any felony’”) mirrored the allegations in

⁸A trial court has a sua sponte obligation to instruct on lesser-included offenses “‘if the evidence “raises a question as to whether all of the elements of the charged offense are present and there is evidence that would justify a conviction of such a lesser offense.”’ [Citation.]” (*People v. Moon, supra*, 37 Cal.4th at p. 25.)

the instant matter. (*Birks, supra*, 19 Cal.4th at p. 118, fn. 8.) *Birks* explained, “[i]t appears well settled that trespass is not a lesser necessarily included offense of burglary, because burglary, the entry of specified places with intent to steal or commit a felony (§ 459), can be perpetrated without committing any form of criminal trespass (see § 602).” (*Ibid.*) The Supreme Court reiterated this conclusion in *People v. Taylor* (2010) 48 Cal.4th 574, 622, and *People v. Foster* (2010) 50 Cal.4th 1301, 1343-1344, explaining that trespass is a lesser-*related* offense, not a lesser-*included* offense, of burglary.

Under *Birks*, a trial court cannot instruct a jury on such related, but not necessarily included, offenses without the prosecutor’s agreement. (*Birks, supra*, 19 Cal.4th at p. 136.) Here, the prosecutor did not support the defense’s request for a trespass instruction. Accordingly, the trial court did not err in refusing to give the instruction.

DISPOSITION

The judgment is affirmed.